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IN THE

Supreme Court of the United States

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "C".

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS AND EXHIBITS.

The Daily Record Co. Print. Balto., Md.

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In The

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID COURT.

CASE "C".

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

Mr. Clerk:

Please file.

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

STATE OF MARYLAND
vs.
MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

CASE "C".

To the Honorable, William Howard Taft, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, the State of Maryland, by Albert C. Ritchie, its Governor, and moves the Court for leave to file the petition for writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and also directing the said District Court to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of said petition, and why your petitioner should not have such relief and such other and further relief in the premises as may be just and meet.

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland.
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID COURT.

CASE "C".

PETITION FOR WRIT OF MANDAMUS.

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THOS. H. ROBINSON,
Attorney General of Maryland,

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Assistant Attorney General of Maryland,
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STATE OF MARYLAND
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MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

CASE "C".

To the Honorable, William Howard Taft, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the State of Maryland, by Albert C. Ritchie, its Governor, respectfully shows unto your Honors that the jurisdiction of the Circuit Court for Harford County, a Court clothed by the Constitution and Laws of the State of Maryland with original jurisdiction, has been invaded by Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and by the said District Court, whose acts and doings complained of are as follows, to wit:

1. On the 10th day of February, 1925, E. Franklin Ely, was indicted in the Circuit Court for Harford County, State of Maryland, for perjury, committed on or about November 20, 1924. On the 11th day of February, 1925, said Judge, Morris A. Soper, and the said District Court issued an order, directed to the Circuit Court for Harford County, and the Judge and Clerk thereof, whereby he caused the

said prosecution, styled "State of Maryland vs. E. Franklin Ely," to be removed from the Circuit Court for Harford County to the District Court of the United States for the District of Maryland, upon the supposed authority of *Section 33 of the Judicial Code* (*U. S. Comp. St. Sec.* 1015, *being Judicial Code, Section 33, as amended, Act August* 23rd, 1916, *c.* 99). The petition, upon which the said removal was granted, alleged that on the day when the perjury is alleged to have been committed, the petitioner was a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

2. The said Judge by "writ of *habeas corpus cum causa,*" also took the body of the said E. Franklin Ely from the custody of the jailor of Harford County and let the said E. Franklin Ely to bail.

3. After the record of the proceedings of the Circuit Court for Harford County was filed in the said District Court of the United States for the District of Maryland, the State of Maryland, on the 12th day of March, 1925, appeared specially in the said District Court, held at Baltimore, Maryland, and moved the said Court to quash the writ and rescind the order, issued by the said District Court on the 11th day of February, 1925, as aforesaid, and to remand the said case to the Circuit Court for Harford County, for the following reasons:

(a) Because the allegations of the petition for removal failed to disclose a state of facts entitling the petitioner to have the said writ issued.

(b) Because the allegations set forth in said petition were contradictory, evasive, founded on hearsay and in part untrue.

(c) Because the issuance of said writ upon the allegations of said petition and the certificate of counsel attached there-

to was beyond the power and jurisdiction of the said District Court as limited by the Constitution and laws of the United States.

(d) Because the said writ, if allowed to stand, constituted an interference by the said District Court with the due and orderly administration of justice in the Circuit Court for Harford County, contrary to the Constitution and laws of the United States.

(e) Because there was no allegation in the petition that authorized the said District Court to issue any writ whatsoever against the Judge or the Clerk of the Circuit Court for Harford County.

(f) Because the crime of perjury for which the said E. Franklin Ely had been indicted in the Circuit Court for Harford County could not possibly have any rational connection with the duties of the said E. Franklin Ely as a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

(g) Because it is inconceivable that in the discharge of his duty as Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States, it would be necessary for the said E. Franklin Ely to commit the crime of perjury.

4. The said motion to remand was fully argued before the said Judge of the said District Court on the 17th day of March, 1925, and on the same day the said Judge, being of the opinion that the said petition for removal was defective, upon application by the United States on behalf of the said E. Franklin Ely, granted leave to the United States to amend said petition for removal.

5. Thereafter, to wit, on the 31st day of March, 1925, the said E. Franklin Ely filed his amended petition in said

cause, pursuant to the leave granted him by the aforesaid order of March 17th, 1925, whereupon the State of Maryland again appeared specially in said cause and again moved to quash the writ and rescind the order of February 11th, 1925, and to remand the said cause to the Circuit Court for Harford County, and assigned substantially the same reasons for the said "motion to quash and remand" as those set forth in its "motion to quash and remand" filed in reply to the original petition for removal, as aforesaid.

6. On the 5th day of May, 1925, after a second hearing the said Judge and the said Court denied the motion to remand the case to the Circuit Court for Harford County, and ratified and confirmed the order of February 11, 1925, removing the said cause to the said District Court from the Circuit Court for Harford County.

7. Your petitioner files with its petition and prays to be taken as part and parcel hereof, a certified copy of the record in "State of Maryland vs. E. Franklin Ely," in the District Court of the United States for the District of Maryland, marked "Exhibit A," and a certified copy of the record in "State of Maryland vs. E. Franklin Ely," in the Circuit Court for Harford County, marked "Exhibit B."

8. Your petitioner avers and charges that the action and conduct of Judge Soper were a gross violation of the Constitution and laws of Maryland and of the Constitution and laws of the United States, because neither the said District Court of the United States for the District of Maryland nor Judge Soper had jurisdiction over the case unlawfully removed by the said Judge Soper, as aforesaid. The prosecution is in the name of the State of Maryland; the crime—perjury—was committed within its territorial limits.

9. Your petitioner alleges that Judge Soper was not authorized to remove the said prosecution, under *Section 33 of the Judicial Code*, upon the allegatoins of the original petition for removal, because (inter alia):

(a) Federal Prohibition Agents are not officers "appointed under or acting by authority of any Revenue Law of the United States" or "persons" acting under or by authority of any such officer," within the meaning of *Section 33 of the Judicial Code.*

(b) Said petition does not show that the criminal prosecution pending in the Circuit Court for Harford County was on account of any act done under color of the office of the defendants in said prosecution, or under color of any Revenue laws of the United States, or on account of any right, title or authority claimed by the said defendants under any Revenue law of the United States, within the meaning of said *Section 33 of the Judicial Code.*

(c) The said petition does not set forth any facts to show that the prosecution for perjury arose out of the discharge of the official duties of the petitioner as a Federal Prohibition Agent or in the discharge of his duty under the National Prohibition Law or that the said prosecution grew out of an effort on the part of said petitioner to protect himself in the discharge of his duty or arose out of any investigation of any violation of the National Prohibition Law, made or attempted to be made by him in the discharge of his duty under said law.

10. Your petitioner avers that the crime of perjury, with which said Federal Prohibition Agent is charged, was his wanton, wilful, deliberate, premeditated act and is not justifiable upon any ground whatsoever, and that the said Federal Prohibition Agent failed to set up any facts to show that said prosecution grew out of an act done by him under color of his office or of any revenue law.

11. Your petitioner further avers that the amended petition for removal is also defective and insufficient for the following reasons:

(a) It fails to specify any facts tending to show that the prosecution, which the said E. Franklin Ely sought to remove, grew out of any act done under color of his office or of any revenue law.

(b) Taken in connection with the allegations of the original petition, the amended petition clearly shows that in the investigation which the said E. Franklin Ely claims to have been making shortly before the acts and happenings for which he was indicted, he was acting in the capacity of a Federal Prohibition Agent under the National Prohibition Law, and as such, he was not a "Revenue Officer" and is not entitled to have the prosecution against him removed to the Federal Court under the provisions of *Section* 33 *of the Judicial Code.*

(c) *Section* 28 *of Title II of the National Prohibition Act,* upon which the amended petition relies as additional authority for the removal of the prosecution, does not, either in its letter or spirit, authorize the removal of a criminal prosecution pending in a State Court against a Federal Prohibition Agent.

(d) The statement in the amended petition, of the facts alleged to bring the prosecution within the provisions of *Section* 33 *of the Judicial Code,* clearly negatives the contention of the said E. Franklin Ely, that the prosecution arose out of any act done under color of his office or of the Revenue Laws and Prohibition Laws of the United States.

(e) The said E. Franklin Ely is charged with perjury at a Coroner's Inquest, held in Harford County, Maryland, on the twentieth day of November, 1924, for the purpose of

ascertaining when, where, how and after what manner one Lawrence Wenger, found dead on the 19th day of November, 1924, had come to his death in said county. It was obviously not in accordance with the duty of said E. Franklin Ely as investigating and reporting officer of the Federal Government, and in compliance with his duties as a Federal Prohibition Officer, as alleged in said amended petition, to relate to the Sheriff and State's Attorney for Harford County, to a number of men who subsequently served upon the Coroner's Jury as mentioned in the indictment and to two detectives of the Baltimore City Police Headquarters, the events which took place on the 19th day of November, 1924, or to go over for such persons the scene of said occurrences.

(f) It was likewise not in accordance with his duty as an investigating and reporting officer of the Federal Government, as alleged in said amended petition, that he was called before the Corner's Inquest, as described in the indictment, and related the said events which took place on the 19th day of November, 1924; nor was he, as alleged, acting under the direction of the Maryland Federal Prohibition Director, when he appeared before the said Coroner's Inquest and related the facts aforementioned, but in appearing before said Inquest and relating said facts he was merely performing the duties imposed upon him under the laws of the State of Maryland. The Coroner and Justice of the Peace was a State officer, constituted and appointed under the laws of the State of Maryland; the Inquest was a State proceeding, provided for by the State laws, and the appearance and testimony of said E. Franklin Ely before said Inquest were not in pursuance of any duty imposed upon him under the National Prohibition Act or of any Revenue Law.

(g) *Section* 33 *of the Judicial Code* does not contemplate that the officers mentioned therein should be entitled to re-

move all causes or prosecutions brought against them during their tenure of office merely by reason of their holding said offices, but said act only applies to those actions and prosecutions which arise out of any act done under color of their office or the law under which they are acting, or on account of any right, title or authority claimed by such officers or other persons under any such law.

12. Your petitioner alleges that the Constitution does not confer upon Congress authority to define and punish crimes against the State; that to permit such intervention by the Federal power, your petitioner charges would be the utter and complete destruction of the State sovereignty and State automony.

13. Your petitioner is advised that perjury is a common law offense, that Federal Courts have no common law jurisdiction in criminal cases; therefore, the trial of the case of "State of Maryland vs. E. Franklin Ely" must be held in the Circuit Court for Harford County, which Court only has jurisdiction, and your petitioner charges that Judge Soper by removing the said case from the Circuit Court for Harford County to the District Court of the United States for the District of Maryland, and taking the said E. Franklin Ely from the custody of the jailor of said county, acted not only without authority and sanction of law, but in violation of law, and his every act and order are null and void and should be so adjudged.

14. Your petitioner further avers that in the prosecution aforesaid, no Federal question is involved; and that the original and amended petitions for removal filed by the said E. Franklin Ely pleaded no right or privilige conferred by the Constitution and laws of the United States.

15. Your petitioner is advised that the said Judge, Morris A. Soper, in removing the said case and in refusing to

remand the same upon the application of your petitioner, has transcended the jurisdiction of his Court and has undertaken the exercise of powers not vested in him or his Court by any law of the United States.

16. Your petitioner is informed and believes and charges that it is the intention of the said Judge, Morris A. Soper, by color of his office as Judge aforesaid, to try the said Federal Prohibition Agent in the District Court of the United States for the District of Maryland at the present term of said Court, now being held in the City of Baltimore, for the offense aforesaid, committed against the laws of the State of Maryland, and thereby violate the Constitution of Maryland, set aside its laws and usurp the jurisdiction of its Courts.

Your petitioner, therefore, prays that a rule may be awarded by this Court requiring the said Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the said District Court to show cause why a mandamus should not be issued, forbidding and preventing the said Judge and the said Court from taking cognizance of said case, and from any, all and every act connected with said trial, and commanding them to remand the said case to the Circuit Court for Harford County and to redeliver to the jailor of said Harford County the body of the said Federal Prohibition Agent, to be dealt with according to the laws of the said State.

And as in duty bound, etc.

ALBERT C. RITCHIE,
Governor of Maryland.

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

STATE OF MARYLAND,

CITY OF BALTIMORE, to wit:

I HEREBY CERTIFY, that on this twenty-fourth day of September, 1925, before me the subscriber, a Notary Public of the State of Maryland, in and for Baltimore City aforesaid, personally appeared Albert C. Ritchie, Governor of the State of Maryland, and made oath that the allegations contained in the petition for mandamus hereto annexed are true to the best of his knowledge, information and belief.

Witness my hand and Notarial Seal.

ANNA DAVIS GREER,
Notary Public.

(Notarial Seal.)

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID DISTRICT COURT.

CASE "C".

EXHIBIT A.

MR. CLERK:

Please file.

THOS. H. ROBINSON,

Attorney General for the State of Maryland.

HERBERT LEVY,

Asst. Attorney General of the State of Maryland.

EXHIBIT A.

STATE OF MARYLAND *vs.* E. FRANK ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. No. 7191 Criminal.

DOCKET ENTRIES.

1925.

Feby. 11—Petition of Defendant for removal of case from Criminal Court of Harford County and for a Writ of Habeas Corpus Cum Causa and Order of Court directing a Writ of Habeas Corpus Cum Causa to issue to the Criminal Court of Harford County filed.

Feby. 11—Writ of Habeas Corpus Cum Causa retble within ten days issued. (Copy of Writ, Copy of Petition and Order sent to Marshal to be served.) (Executed. For return see back of Writ.)

Feby. 18—Motion to quash Writ and rescind Order of Court filed.

Feby. 21—Record of Proceedings of Circuit Court for Harford County filed.

Mch. 17—Order of Court granting leave to United States to amend its petition filed.

Mch. 31—Amended Petition of Defendant for removal of case from Criminal Court of Harford County and for a Writ of Habeas Corpus Cum Causa filed.

April 11—Motion to Quash and Remand Indictment for Perjury on Amended Petition filed.

May 5—Stipulation filed.

May 5—Order of Court Overruling Motion to Quash and Remand filed.

PETITION FOR REMOVAL AND ORDER OF COURT THEREON.

Filed February 11, 1925.

State of Maryland *vs.* E. Frank Ely.	In the District Court of the United States for the District of Maryland.

To the Honorable, the Judge of said Court:

The Petition of E. Frank Ely respectfully represents:

1. That on or about the tenth day of February, in the year of our Lord nineteen hundred and twenty-five, an indictment was returned into the Criminal Court for Harford County, State of Maryland, by a Grand Jury of the said Court, which indictment charged your Petitioner with the crime of perjury, contrary to the laws of the State of Maryland, by reason of the fact that on or about the twentieth day of November, nineteen hundred and twenty-four, it is alleged that your Petitioner unlawfully and feloniously did falsely swear to material facts in connection with and relating to the prosecution for murder of one Lawrence Wenger.

2. That on the nineteenth day of November, nineteen hundred and twenty-four, the Petitioner E. Frank Ely was, and now is a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

3. That the act or acts done by the Petitioner E. Frank Ely at the time when he was alleged to have been guilty of perjury, which charge he denies, was done by him in the discharge of his official duties as Prohibition Agent as aforesaid in making and attempting to make an investigation in the discharge of his duties as aforesaid and in reporting the results of said investigation and in protecting himself and his fellow officers of the Internal Revenue in the discharge of their and his duty.

4. That the said criminal prosecution commenced by said indictment is now pending in the Criminal Court for Harford County and is a criminal prosecution on account of the acts alleged to have been done by your petitioner in the course of the performance of his duties as Federal Prohibition Agent, which acts he denies having done.

WHEREFORE, your Petitioner prays that the said suit may be removed from the Criminal Court for Harford County aforesaid, to this Honorable Court and that writs of certiorari and habeas corpus cum causa issue for that purpose pursuant to the statute of the United States in such case made and provided. (U. S. Compiled Statutes, Sec. 1015, being Judicial Code Sec. 33, as amended, Act August 23, 1916, C. 399.)

E. FRANK ELY.

By A. W. W. WOODCOCK,

United States Attorney for the
District of Maryland.

UNITED STATES OF AMERICA, DISTRICT OF MARYLAND, TO WIT:

I hereby certify that before me, the undersigned, personally appeared E. Frank Ely, a Federal Prohibition Agent,

and made oath in due form of law that he is the person whose name is subscribed to the aforegoing petition, and that he has read the petition, and the matters contained therein are true in substance and in fact.

CHAS. W. ZIMMERMANN,

Chief Deputy Clerk of the District Court of the United States for the District of Maryland.

I, A. W. W. Woodcock, United States Attorney in and for the District of Maryland, do hereby certify that, as attorney for the petitioner named above, I have examined the proceedings against him mentioned in the aforegoing petition and have carefully inquired into all the matters set forth in the said petition and I believe the same to be true.

A. W. W. WOODCOCK,

United States Attorney.

ORDER.

Upon action of A. W. W. Woodcock, United States Attorney, attorney for E. Frank Ely, and on filing the petition of the said E. Frank Ely, praying for the removal to this Court from the Criminal Court of Harford County, in the State of Maryland, of the criminal prosecution for perjury against the said E. Frank Ely, and for the issuance of writs of certiorari and habeas corpus cum causa for that purpose, pursuant to Section 33 of the Judicial Code of the United States, and the Court having read said petition, it is ORDERED this eleventh day of February,

nineteen hundred and twenty-five, that writs of certiorari and habeas corpus cum causa issue herein directed to the said Court requiring said Court to transmit to this Court within ten days the record and proceedings in said case.

MORRIS A. SOPER,

United States District Judge,
United States District Court
for the District of Maryland.

ORDER OF REMOVAL, WRIT OF CERTIORARI AND HABEAS CORPUS CUM CAUSA.

Filed February 11, 1925.

STATE OF MARYLAND *vs.* E. FRANK ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

To the Honorable, the Circuit Court of Harford County, in the State of Maryland, the Judge of the said Court and the Clerk of the said Court, Greeting:

Being informed that there is now pending before you a suit in which the State of Maryland is plaintiff and E. Frank Ely is the defendant, which said suit is a criminal prosecution against the said E. Frank Ely, charging the defendant with perjury in connection with a prosecution for murder arising out of and relating to the facts which occurred while the said E. Frank Ely was on November 19, 1924, discharging his official duty as a Prohibition Agent, officer of the Internal Revenue Service of the United States as aforesaid in making and attempting to make an investigation in the discharge of his duty and in protecting himself in the discharge of his duty under the National Prohibition Act of the said United States; and which said suit has not yet been heard and determined.

Now, therefore, we being willing that said cause and the records and proceedings therein should be certified by said Judge of the Circuit Court of Harford County, in the State

of Maryland, do hereby command you that you immediately deliver the body of E. Frank Ely into the custody of the United States Marshal to be dealt with in this cause according to law and the order of the District Court for the District of Maryland and that you send, without delay and within ten days to the District Court of the United States, for the District of Maryland, the records and proceedings in said cause so that the said District Court of the United States may act thereon as of right and according to the laws and customs of the said United States, among others, Section 1015 of the United States Compiled Statutes, being Judicial Code, Sec. 33, as amended by its Act of August 23, 1916, C. 399.

WITNESS the Honorable Morris A. Soper, Judge of said District Court of the United States, this 11th day of February, A. D. nineteen hundred and twenty-five.

ARTHUR L. SPAMER,

Clerk of the District Court of the United
(Seal.) States for the District of Maryland.

The foregoing Writ is thus endorsed:

"Copy of within Writ of Habeas Corpus Cum Causa and Copy Petition for and Order of Removal, left with J. H. Bradford, Deputy Clerk, Circuit Court of Harford County, at Belair, Md., 12th day of February, 1925.

GEORGE W. COLLIER,
United States Marshal,
District of Maryland,

By: GEO. H. EDELEN,
Chief Deputy Marshal."

MOTION TO QUASH AND REMAND.

Filed February 18, 1925.

STATE OF MARYLAND *vs.* E. FRANKLIN ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

To the Honorable, Morris A. Soper, Judge of said Court:

The State of Maryland, by Thomas H. Robinson, its Attorney General, and W. Worthington Hopkins, State's Attorney for Harford County, who appear specially for the purposes of this motion, and for no other purpose, move this Honorable Court to quash the writ and rescind the order issued in the above entitled case, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, for the following reasons:

(1) Because the allegations of the petition filed in this case do not disclose a state of facts entitling the petitioner to have said writ issued, or the charge against him removed into this Court.

(2) Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, and in part untrue.

(3) Because the issuance of said writ upon the allegations of said petition and attached certificate of counsel is beyond the power and jurisdiction of this Court as limited by the Constitution and laws of the United States.

(4) Because the said writ, if allowed to stand, constitutes an interference by this Court with the due and orderly administration of justice in the Circuit Court for Harford County contrary to the Constitution and laws of the United States.

(5) Because there is no allegation in said petition that authorizes this Court to issue any writ whatsoever against the Judge or the Clerk of the Circuit Court for Harford County.

(6) Because the crime of perjury against the laws of the State of Maryland for which E. Franklin Ely has been indicted in the Circuit Court for Harford County could not possibly have any causal connection with the duties of the said E. Franklin Ely as a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

(7) Because it is inconceivable that in the discharge of his duties as a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States, it would be necessary for the said E. Franklin Ely to commit the crime of perjury against the laws of the State of Maryland.

(8) Because at the time of the commission of said crime of perjury, the said E. Franklin Ely was testifying under oath before an officer of the State of Maryland, duly authorized to administer oaths, and was not at that time engaged in the performance of any duty pertaining to his office as Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

(9) And for other good and sufficient reasons to be shown at the hearing.

THOMAS H. ROBINSON,
Attorney-General of Maryland.

W. WORTHINGTON HOPKINS,
State's Attorney for Harford County.

ORDER GRANTING LEAVE TO AMEND PETITION.

Filed March 17, 1925.

STATE OF MARYLAND *vs.* E. FRANKLIN ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. (INDICTMENT FOR PERJURY.)

This cause standing ready for hearing, and being submitted upon motion of the State of Maryland to quash the writ and rescind the order issued in the above entitled case on the 11th day of February, 1925, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, and to remand the said case to the Circuit Court for Harford County, the counsel for the parties were heard and the proceedings were read and considered; and the United States having applied for leave of court to amend the petition, it is therefore ordered this 17th day of March, in the year 1925, by the District Court of the United States for the District of Maryland:

That leave be and it is hereby granted to the United States to amend said petition.

MORRIS A. SOPER,

United States District Judge.

AMENDED PETITION FOR REMOVAL AND ORDER OF COURT.

Filed March 31, 1925.

STATE OF MARYLAND *vs.* E. FRANKLIN ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

AMENDED PETITION.

To the Honorable, the Judge of said Court:

The Petition of E. Franklin Ely respectfully represents:

1. That on or about the tenth day of February, in the year of our Lord nineteen hundred and twenty-five, an indictment was returned in the Circuit Court of the Third Judicial Circuit of the State of Maryland by the Grand Inquest of the State of Maryland for the body of Harford County, which indictment charged your Petitioner with the crime of perjury, as follows:

"The Jurors of the State of Maryland, for the body of Harford County, do on their oath present that on the twentieth day of November, in the year of our Lord nineteen hundred and twenty-four, at Harford County aforesaid, one Lewis J. Williams, then and there a Justice of the Peace of the State of Maryland, in and for Harford County, duly commissioned and qualified acting as a Coroner, was duly

sitting in his capacity as Coroner at the Court House of Harford County at Bel Air, in said County; and that then and there at a certain inquiry, investigation and inquest before the said Lewis J. Williams, so sitting then and there as a Coroner, as aforesaid, within the jurisdiction of the said Lewis J. Williams, as aforesaid, of the matter of when, where, how and after what manner one Lawrence Wenger came to his death; and at said investigation one E. Franklin Ely, late of said County, was in due form of law sworn by the said Lewis J. Williams, Coroner as aforesaid, then and there having competent power and authority to administer to him, the said E. Franklin Ely, an oath to speak the truth, the whole truth and nothing but the truth touching the inquiry, investigation and inquest then and there under examination by the said Lewis J. Williams, Coroner as aforesaid.

Whereupon it then and there became and was a question material to the said inquiry, investigation and inquest whether or not, on the said 19th day of November, 1924, the said E. Franklin Ely had seen Lawrence Wenger at or about the time that he, the said E. Franklin Ely, lay concealed and hidden near and watching the said still mentioned in the evidence at the said inquiry, investigation and inquest.

And to this, he, the said E. Franklin Ely, did, at the said inquiry, investigation and inquest, on the said twentieth day of November, in the year of our Lord nineteen hundred and twenty-four, at the County aforesaid, having been duly sworn as aforesaid, unlawfully, wilfully, falsely, wickedly, maliciously and corruptly testify and say in substance and effect that he, the said E. Franklin Ely, had never seen that man, at the aforementioned time,—meaning the said Lawrence Wenger.

Whereas, in truth and in fact, he, he said E. Franklin Ely, at the said inquiry, investigation and inquest, before the said Lewis J. Williams, Coroner as aforesaid, well knew that, at the aforementioned time, he had seen that man, meaning Lawrence Wenger, as he, the said E. Franklin Ely, lay concealed and hidden near and was watching the said still mentioned in the evidence.

And so the Jurors aforesaid, upon their oath aforesaid, do say that the said E. Franklin Ely, on the said twentieth day of November, in the year of our Lord nineteen hundred and twenty-four, at Harford County aforesaid, before the said Lewis J. Williams, Justice of the Peace of the State of Maryland, in and for Harford County, acting as Coroner as aforesaid, (he, the said Lewis J. Williams, Justice of the Peace, acting in his capacity as Coroner, as aforesaid, then and there having such power and authority as aforesaid) by his own act and consent and of his wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, corruptly, maliciously and unlawfully did commit wilful and corrupt perjury; contrary to the form of the Act of Assembly in such case made and provided; and against the peace, government and dignity of the State.

W. Worthington Hopkins,

State's Attorney for Harford County."

2. That on the twentieth day of November, nineteen hundred and twenty-four, the Petitioner was and he is employed as a Federal Prohibition Officer of the Bureau of Internal Revenue of the Treasury Department of the United States, to act under the direction of the Commissioner of Internal Revenue, the Federal Prohibition Commissioner and the Federal Prohibition Director for the

State of Maryland, and to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto and all Internal Revenue Laws relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors with authority to execute and perform all the duties delegated to such officers by law.

3. That the acts alleged to have been done by the Petitioner are alleged to have been done at a time when he was engaged in the discharge of his official duties as a Federal Prohibition Officer, and in making and attempting to make an investgiation concerning a violation of the National Prohibition Act and other Internal Revenue Laws, and in reporting the results of said investigation concerning a violation of the National Prohibition Act and other Internal Revenue Laws, and in protecting himself and his fellow officers of the Internal Revenue in the discharge of his and their duty as follows:

That on November 19, 1924, your petitioner, together with Federal Prohibition Officers Robert D. Ford, John M. Barton, Wilton L. Stevens and their chauffeur, William Trabing, were directed by Maryland Federal Prohibition Director Edmund Budnitz to investigate the alleged unlawful distillation of intoxicating liquor on a farm known as the Harry Carver Farm situated approximately three miles from the village of Madonna, about twelve miles northwest from Bel Air, Maryland, which said property was then unoccupied. Your petitioner, in company with his associates reached the said farm premises shortly after midday on November nineteenth, nineteen hundred and twenty-four, and discovered there in a secluded wooded valley and swamp, materials for an illicit distilling operation, to wit, nine empty mash boxes, three fifty-gallon metal drums, a fifty-gallon condenser, about one thousand pounds of rye meal in bags, a lighted fire and men's working clothes. Your Petitioner and his associates thereupon concealed

themselves in woods and shrubbery nearby the still site and shortly thereafter became aware of the approach of a number of men bringing with them a still. Your Petitioner and his companions thereupon made their presence known to the men who were approaching and the men immediately dropped the still and fled; and though your Petitioner and his associates pursued them across the fields no one of the fleeing men was overtaken or arrested. Thereupon your Petitioner and his associates returned to the still site, destroyed the materials above mentioned which consisted the unlawful distilling plant, and started to return to their car which had been left some distance from the still site, for the purpose of returning to Baltimore to report to the office of the Maryland Federal Prohibition Director concerning the results of their investigation, when they discovered a man, whom they afterwards learned to be one Lawrence Wenger, mortally wounded and lying beside the path along which they were walking, some 400 or 500 yards from the still site and in a direction opposite to that from which the unknown men had approached and towards which they fled. Whereupon your Petitioner and his associates carried the wounded man to their car and took him to Jarrettsville, Maryland, for medical treatment, but finding none there available, proceeded with all speed to Bel Air, where they sought out in turn Doctors, Richardson, Sappington and Archer without success and finally placed the said Lawrence Wenger in charge of Doctor Van Bibber, who pronounced him dead. Your Petitioner and his associates then acting under the advice of Doctor Van Bibber removed the body of the said Lawrence Wenger to the undertaking establishment of Dean and Foster in Bel Air. Your Petitioner and his associates then proceeded to the State's Attorney's office in Bel Air and related the facts aforesaid to the State's Attorney; whereupon, on being informed by them that they were prohibition officers, they were placed under arrest by the Sheriff of Harford County at the instance of the State's Attorney and were confined

in the Harford County Jail until the following morning, November twentieth, nineteen hundred and twenty-four. On the morning of November twentieth, nineteen hundred and twenty-four, your Petitioner and his associates were taken by the Sheriff and State's Attorney, in company with a number of men who that afternoon served upon the Coroner's Jury mentioned in the indictment, and in company with two Baltimore City Police Headquarters Detectives to the scene of their investigation of the previous day. There they related the facts concerning their investigation of the unlawful distilling operation and their finding of the said Lawrence Wenger on November nineteenth, and then and there went over the scene of the said occurrences relating freely and without reservation the events which took place November nineteenth, in accordance with their duty as investigating and reporting officers of the Federal Government and in compliance with their duties as Federal Prohibition Officers. Likewise on the afternoon of November twentieth your Petitioner and his associates were called before the Coroner's Inquest heretofore described in the indictment and freely and without reservation in accordance with their duty as investigating and reporting officers of the Federal Government and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned. And thereupon they were again placed in the Harford County Jail and held for the action of the Harford County Grand Jury until their release on bail upon the evening of November 20, 1924, at the instance of the United States Attorney for the District of Maryland, acting on their behalf.

4. That the said Criminal Prosecution was commenced in the manner following:

A presentment against your Petitioner was returned in the Circuit Court for Harford County, February 9, 1925, following which presentment the State of Maryland, by the

State's Attorney for Harford County, prosecuted and sued forth out of the Circuit Court for Harford County a Writ of the State of Maryland of *Capias Ad Respondendum* against your petitioner, to which there was no return by the Sheriff for Harford County, whereupon the indictment heretofore set forth was returned.

5. The said indictment is now pending in the Circuit Court for Harford County and is a criminal prosecution on account of acts alleged to have been done by your petitioner at a time when he was engaged in the performance of his duties as a Federal Prohibition Officer.

WHEREFORE, your Petitioner prays that the said suit may be removed from the Circuit Court for Harford County, aforesaid, to this Honorable Court and that writs of certiorari and habeas corpus cum causa may issue for that purpose pursuant to the Statute of the United States in such case made and provided. (U. S. Compiled Statutes, Sec. 1015, being Judicial Code Sec. 33, as amended, Act August 23, 1916, C. 399; National Prohibition Act, Title II, Section 28.)

E. FRANKLIN ELY.

By A. W. W. WOODCOCK,

United States Attorney for the
District of Maryland.

3/30/25.

UNITED STATES OF AMERICA, DISTRICT OF MARYLAND, TO WIT:

I hereby certify that before me, the undersigned, personally appeared E. Franklin Ely, a Federal Prohibition Agent, and made oath in due form of law that he is the person whose name is subscribed to the aforegoing peti-

tion, and that he has read the petition and the matters contained therein are true in substance and in fact.

CHAS. W. ZIMMERMANN,

Chief Deputy Clerk of the District Court of the United States for the District of Maryland.

I, A. W. W. Woodcock, United States Attorney in and for the District of Maryland, do hereby certify that, as attorney for the petitioner named above, I have examined the proceedings against him mentioned in the aforegoing petition and have carefully inquired into the all the matters set forth in the said petition and I believe the same to be true.

A. W. W. WOODCOCK,

3/30/25. United States Attorney.

ORDER.

Upon motion of A. W. W. Woodcock, United States Attorney, attorney for E. Franklin Ely, and on filing the petition of the said E. Franklin Ely, praying for the removal to this Court from the Circuit Court for Harford County in the State of Maryland, of the Criminal Prosecution for perjury against the said E. Franklin Ely, and for the issuance of writs of certiorari and habeas corpus cum causa for that purpose, pursuant to Section 33 of the Judicial Code of the United States, and Section 28 of Title II of the National Prohibition Act, and the Court having read said petition, it is ORDERED, this thirty-first day of March, nineteen hundred and twenty-five, that writs of certiorari and habeas corpus cum causa issue herein di-

rected to the said Court and to the Clerk of the said Court requiring them to transmit to this Court within ten days the record and proceedings in said case.

.....

United States District Judge,
United States District Court
for the District of Maryland.

MOTION TO QUASH AND REMAND ON AMENDED PETITION.

Filed April 11, 1925.

STATE OF MARYLAND *vs.* E. FRANKLIN ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. (Amended Petition.)

MOTION TO QUASH AND REMAND—INDICTMENT FOR PERJURY.

To the Honorable, Morris A. Soper, Judge of said Court:

The State of Maryland, by Thomas H. Robinson, its Attorney General, and W. Worthington Hopkins, State's Attorney for Harford County, who appear specially for the purposes of this motion, and for no other purpose, moves this Honorable Court to quash the writ and rescind the order issued in the above entitled case, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, and to remand the said case to the Circuit Court for Harford County, for the following reasons:

1. Because the allegations of the second paragraph of the amended petition are untrue.

2. Because the allegations of the petition filed in this case do not disclose a state of facts entitling the petitioner

to have said writ issued, or the charge against him removed into this Court.

3. Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, and in part untrue.

4. Because the issuance of said writ upon the allegations of said petition and attached certificate of counsel is beyond the power and jurisdiction of this Court as limited by the Constitution and laws of the United States.

5. Because the said writ, if allowed to stand, constitutes an interference by this Court with the due and orderly administration of justice in the Circuit Court for Harford County contrary to the Constitution and laws of the United States.

6. Because there is no allegation in said petition that authorizes this Court to issue any writ whatsoever against the Judge or the Clerk of the Circuit Court for Harford County.

7. Because the crime of perjury against the laws of the State of Maryland for which E. Franklin Ely has been indicted in the Circuit Court for Harford County could not possibly have any causal connection with the duties of the said E. Franklin Ely as a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

8. Because it is inconceivable that in the discharge of his duties as a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States, it would be necessary for the said E. Franklin Ely to commit the crime of perjury against the laws of the State of Maryland.

9. Because at the time of the commission of said crime of perjury, the said E. Franklin Ely was testifying under oath before an officer of the State of Maryland, duly authorized to administer oaths, and was not at that time engaged in the performance of any duty pertaining to his office as Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

10. And for other good and sufficient reasons to be shown at the hearing.

THOMAS H. ROBINSON,

Attorney General of Maryland.

HERBERT LEVY,

State's Attorney for Harford County.

ORDER OVERRULING MOTION TO QUASH AND REMAND.

Filed May 5, 1925.

STATE OF MARYLAND *vs.* E. FRANKLIN ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. INDICTMENT FOR PERJURY.

This cause standing ready for hearing and being submitted upon motion of the State of Maryland to quash the writ and rescind the order issued in the above entitled case on the 11th day of February, 1925, directed to the Judge of the Circuit Court for Harford County, and the Clerk thereof, and to remand the said case to the Circuit Court for Harford County, the counsel for the parties were heard and the proceedings were read and considered.

It is, therefore, this 5th day of May, 1925, ordered by the District Court of the United States for the District of Maryland, that the said motion of the State of Maryland be and the same is hereby overruled, and that the removal of this cause to this Court from the Circuit Court for Harford County, in the State of Maryland, as directed by the said order of this Court dated February 11th, 1925, be and the same is hereby ratified and confirmed.

The United States District Court for the District of Maryland does further certify to the Supreme Court of the United States that the sole issue before the said District Court of the United States for the District of Maryland, in

the said motion to quash and remand filed by the State of Maryland, was the jurisdiction of the said Court to remove this cause to said Court from the Circuit Court for Harford County, in the State of Maryland, and that in hereby ordering said removal, the said Court does hereby adjudicate said question of jurisdiction adversely to the State of Maryland.

MORRIS A. SOPER,

United States District Judge.

STIPULATION.

Filed May 5, 1925.

STATE OF MARYLAND *vs.* E. FRANKLIN ELY.	IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. (INDICTMENT FOR PERJURY.)

It is stipulated by and between the parties hereto that Robert D. Ford, John M. Barton, Wilton L. Stevens and E. Franklin Ely, during the month of November, in the year 1924, and prior to said time, and at the time of the matters and facts charged in the indictment in the Circuit Court for Harford County, were federal prohibition officers, holding a commission under the Commissioner of Internal Revenue and countersigned by the Federal Prohibition Commissioner, in the form following, that is to say:

"Date No.

THE UNITED STATES.

TREASURY DEPARTMENT. INTERNAL REVENUE SERVICE.

This certifies that.....is hereby employed as a Federal Prohibition Officer to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto and all Internal Revenue Laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors, and he is hereby authorized to

execute and perform all the duties delegated to such officers by law.

Countersigned:

.....	.....
Federal Prohibition Commissioner.	Commissioner of Internal Revenue.

This Commission is void if photograph of bearer does not appear above."

And that William Trabing was, at the time of the acts alleged in the indictment in the Circuit Court for Harford County, a chauffeur of the Reliable Transfer Company, engaged and employed by Edmund Budnitz, Federal Prohibition Director of the State of Maryland, in the capacity of chauffeur for the Prohibition Agents above named.

IN THE

Supreme Court of the United States

IN THE MATTER OF THE APPLICATION OF THE STATE OF MARYLAND FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE, MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AND DIRECTED ALSO TO SAID DISTRICT COURT.

CASE "C".

EXHIBIT B.

MR. CLERK:

Please file.

THOS. H. ROBINSON,

Attorney General for the State of Maryland.

HERBERT LEVY,

Asst. Attorney General of the State of Maryland.

EXHIBIT B.

RECORD OF PROCEEDINGS OF CIRCUIT COURT FOR HARFORD COUNTY FILED IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, FEBRUARY 21, 1925.

STATE OF MARYLAND, HARFORD COUNTY, TO WIT:

At a session of the Circuit Court for the Third Judicial Circuit of the State of Maryland, begun and held for Harford County, at the Court House in the Town of Bel Air, in the same County, on the second Monday of February, it being the ninth day of the same month, in the year of our Lord one thousand nine hundred and twenty-five.

Present:
The Honorable, T. Scott Offutt, Chief Judge,
The Honorable, Frank I. Duncan, Associate Judge,
The Honorable, William H. Harlan, Associate Judge,
The Honorable, Walter W. Preston, Associate Judge,
Isaac W. Thompson, Esq., Sheriff,
D. Gilpin Wilson, Clerk.

Among others were the following proceedings, to wit:

STATE OF MARYLAND
vs.
E. FRANKLIN ELY.

Be it remembered, that at the present term of this Honorable Court, held as aforesaid, Frederick C. Jones, A. Lynn Baker, Wilson R. Mitchell, Isaac A. Hoffman, Harry F. Daughton, George K. Livezey, Louis Amrein, Charles W. Walker, William A. Bodt, Harry E. Martin, Hargraves Spalding, T. Norman Harkins, Lawrence E. Bauer, Preston

C. Snodgrass, J. Henry Baird, Edward Breidenbaugh, Seth B. Taylor, Harry F. Pyle, Frederick O. Veile, Samuel E. Walker, Harry E. Sheridan, George C. Proctor and John E. Webster, good and lawful men of the County aforesaid, who being empannelled, sworn and charged as the Grand Inquest of the State of Maryland for the body of Harford County, having withdrawn from the Bar of this Honorable Court here, did afterwards return and present to this Honorable Court a presentment in the words and form following, to wit:

IN THE CIRCUIT COURT FOR HARFORD COUNTY:

February Term, 1925.

The Grand Inquest of the State of Maryland for the body of Harford County do, on their oath present that E. Franklin Ely, late of Harford County aforesaid, at County aforesaid, on the twentieth day of November, nineteen hundred and twenty-four, committed perjury before a Coroner's Inquest against the peace, government and dignity of the State.

FRED C. JONES, Foreman.

Witness:

Abraham Woods,
Ralph T. Woods,
James Patterson,
John H. Henson,
John Cook (col.),
Charles Bobbitt.

Whereupon, the State of Maryland, by W. Worthington Hopkins, Esq., State's Attorney for Harford County, prosecuted and sued forth out of this Honorable Court the Writ of the State of Maryland of *Capias ad respondendum* against the said E. Franklin Ely, to the Sheriff of Harford County, in the words and form following:

STATE OF MARYLAND,

To the Sheriff of Harford County—Greeting:

You are hereby commanded to take the body of E. Franklin Ely, late of Harford County, if he shall be found in your bailiwick, and that him so taken, you safely keep, so that you have his body before the Circuit Court for Harford County, at the Court House in the same County, at once to answer unto the State of Maryland on a presentment and indictment committed perjury before a Coroner's Inquest contrary to the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

Hereof fail not at your peril, and have you then and there this Writ.

WITNESS the Honorable T. Scott Offutt, Chief Judge of our said Court, the 9th day of Feby., (Seal.) 1925. Issued the 10th day of Feby., 1925.

Test: D. G. WILSON, Clerk.

Witness:
Abraham Woods,
Ralph T. Woods,
James Patterson,
John H. Henson,
John Cook (col.),
Charles Bobbitt,
Dewey F. Bowman,
Edgar T. Marshall,
D. Ford Cathcart.

To which said Writ of the State of Maryland of *Capias ad respondendum* (which was delivered to the said Sheriff of Harford County to be executed) there has been no Re-

turn to this Honorable Court, and the said E. Franklin Ely, as shown by the Records of this Honorable Court, is still at large.

And the said W. Worthington Hopkins, Esq., the State's Attorney for Harford County, exhibits to the Grand Inquest of the State of Maryland, for the body of Harford County, an indictment against the said E. Franklin Ely in the words and form following, to wit:

STATE OF MARYLAND, HARFORD COUNTY, TO WIT:

The Jurors of the State of Maryland, for the body of Harford County, do on their oath present that on the twentieth day of November, in the year of our Lord nineteen hundred and twenty-four, at Harford County aforesaid, one Lewis J. Williams, then and there a Justice of the Peace of the State of Maryland, in and for Harford County, duly commissioned and qualified acting as a Coroner, was duly sitting in his capacity as Coroner at the Court House of Harford County at Bel Air, in said County; and that then and there at a certain inquiry, investigation and inquest before the said Lewis J. Williams, so sitting then and there as Coroner, as aforesaid, within the jurisdiction of the said Lewis J. Williams, as aforesaid, of the matter of when, where, how and after what manner one Lawrence Wenger come to his death; and at said investigation one E. Franklin Ely, late of said County, was in due form of law sworn by the said Lewis J. Williams, Coroner as aforesaid, then and there having competent power and authority to administer to him, the said E. Franklin Ely, an oath to speak the truth, the whole truth and nothing but the truth touching the inquiry, investigation and inquest then and there under examination by the said Lewis J. Williams, Coroner as aforesaid.

Whereupon it then and there became and was a question material to the said inquiry, investigation and inquest

whether or not, on the said 19th day of November, 1924, the said E. Franklin Ely had seen Lawrence Wenger at or about the time that he, the said E. Franklin Ely, lay concealed and hidden near and watching the said still mentioned in the evidence at the said inquiry, investigation and inquest.

And to this, he, the said E. Franklin Ely, did, at the said inquiry, investigation and inquest, on the said twentieth day of November, in the year of our Lord nineteen hundred and twenty-four, at the County aforesaid, having been duly sworn as aforesaid, unlawfully, wilfully, falsely, wickedly, maliciously and corruptly testify and say in substance and effect that he, the said E. Franklin Ely, had never seen that man, at the aforementioned time,—meaning the said Lawrence Wenger.

Whereas, in truth and in fact, he, the said E. Franklin Ely, at the said inquiry, investigation and inquest, before the said Lewis J. Williams, Coroner as aforesaid, well knew that, at the aforementioned time, he had seen that man, meaning Lawrence Wenger, as he, the said E. Franklin Ely, lay concealed and hidden near and was watching the said still mentioned in the evidence.

And so the Jurors aforesaid, upon their oath aforesaid, do say that the said E. Franklin Ely, on the said twentieth day of November, in the year of our Lord nineteen hundred and twenty-four, at Harford County aforesaid, before the said Lewis J. Williams, Justice of the Peace of the State of Maryland, in and for Harford County, acting as Coroner as aforesaid, (he, the said Lewis J. Williams, Justice of the Peace, acting in his capacity as Coroner, as aforesaid, then and there having such power and authority as aforesaid), by his own act and consent and of his wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, corruptly, maliciously and unlawfully did

commit wilful and corrupt perjury; contrary to the form of the Act of Assembly in such case made and provided; and against the peace, government and dignity of the State.

W. WORTHINGTON HOPKINS,
State's Attorney for Harford County.

Whereupon, the said Grand Inquest of the State of Maryland for the body of Harford County, returned the said Indictment to our Honorable Court here thereon endorsed:

"True Bill.

FRED C. JONES, Foreman."

And afterwards, to wit, on the 12th day of February, 1925, a Petition, Affidavit and Order of Court issuing out of the Honorable, the United States District Court for the District of Maryland, commanding the transmission of the Record of Proceedings in the case be sent to the Honorable, the United States District Court for the District of Maryland, were received by the Clerk of the Honorable, the Circuit Court of the Third Judicial Circuit of the State of Maryland, for Harford County, under protest.

STATE OF MARYLAND, HARFORD COUNTY, TO WIT:

I, D. Gilpin Wilson, Clerk of the Circuit Court for Harford County, the same being a Court of Law and Record, hereby certify that the aforegoing is a true, full and complete transcript of the Record of Proceedings in the therein entitled case, as the same remains of record in this office.

IN TESTIMONY WHEREOF, I hereto subscribe my name and affix the seal of the Circuit Court for Harford County, this 21st day of February, 1925.

(Seal.)

D. GILPIN WILSON,
Clerk of the Circuit Court of the Third Judicial Circuit of the State of Maryland, for Harford County.

Whereupon, the Record of Proceedings is transmitted accordingly.

D. GILPIN WILSON, Clerk.

UNITED STATES OF AMERICA,

DISTRICT OF MARYLAND, to wit:

I, ARTHUR L. SPAMER, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing papers comprising Exhibits "A" and "B" are true copies respectively of all the original papers filed on the respective dates set forth in the captions thereto, in the case of State of Maryland versus E. Franklin Ely, No. 7191 Criminal, in the District Court of the United States for the District of Maryland, and I further certify that the Docket Entries above set forth are truly taken from the record of proceedings in said case.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said District Court, this 24th day of September, A. D. 1925.

(Seal.)

ARTHUR L. SPAMER,
Clerk.

CERTIFIED COPY OF DOCKET ENTRIES—CIRCUIT COURT FOR HARFORD COUNTY.

STATE OF MARYLAND *vs.* E. FRANKLIN ELY.	}	IN THE CIRCUIT COURT FOR HARFORD COUNTY.

February 10, 1925—Presentment for Perjury filed and Capias issd. Same day, Indictment endorsed "True Bill" filed.

February 12, 1925—Petition and Affidavit of the District Attorney of the United States District Court for the District of Maryland for Removal and Order of said Court commanding that Record of Proceedings be sent to the said United States District Court for the District of Maryland received by the Clerk of this Court under Protest and copy of same left and filed.

STATE OF MARYLAND, HARFORD COUNTY, SCT:

I hereby certify that the above is a true copy of the Docket Entries in the above entitled case, as same remains of record in this office.

In Testimony Whereof, I hereto subscribe my name and affix the Seal of the Circuit Court for Harford County, this 11th day of September, 1925.

(Seal.)

D. GILPIN WILSON,
Clerk of the Circuit Court
for Harford County.

20

Office Supreme Court, U. S.
FILED
OCT 24 1925
WM. R. STANSBURY
CLERK

25 Orig.

IN THE

Supreme Court of the United States

STATE OF MARYLAND
versus
MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "C."

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS ON BEHALF OF THE STATE OF MARYLAND.

Mr. Clerk:

Please file:

THOS. H. ROBINSON,
Attorney General of Maryland.

HERBERT LEVY,
Assistant Attorney General of Maryland.

The Daily Record Company Print, Baltimore, Md.

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NOTE: For detailed discussion of questions involved, see briefs in support of petitions on behalf of the State of Maryland in the cases of "State of Maryland vs. Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the District Court of the United States for the District of Maryland, **CASE 'A'**," and "State of Maryland vs. Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the District Court of the United States for the District of Maryland, **CASE 'B'**."

AUTHORITIES.

For authorities upon the questions in this case, see briefs in support of petitions on behalf of the State of Maryland in the case of State of Maryland vs. Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the District Court of the United States for the District of Maryland, **CASE 'A'**," and "State of Maryland vs. Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the District Court of the United States for the District of Maryland, **CASE 'B'**."

STATE OF MARYLAND *vs.* MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.	IN THE SUPREME COURT OF THE UNITED STATES.

CASE "C."

BRIEF IN SUPPORT OF PETITION FOR MANDAMUS ON BEHALF OF THE STATE OF MARYLAND.

Statement of the Case.

On the 10th of February, 1925, E. Franklin Ely was indicted in the Circuit Court for Harford County, State of Maryland, for perjury. The indictment charged that the perjury was committed before a Coroner's Inquest held in Harford County, Maryland, on the 20th day of November, 1924, for the purpose of ascertaining when, where, how and after what manner one Lawrence Wenger, found dead on the 19th day of November, 1924, had come to his death in said county. On the 11th day of February, 1925, Ely, through the United States Attorney for the District of Maryland, filed a petition in the District Court of the United States for the District of Maryland (Morris A. Soper, Judge), for the removal of said case from the Circuit Court for Harford County to

the said District Court, under the provisions of *Section 33 of the Judicial Code*, and for a *writ of habeas corpus cum causa* for that purpose.

The petition alleged that Ely was a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States, and, at the time when the perjury is alleged to have been committed, was acting under and by authority of the Federal Prohibition Director of the State of Maryland.

The petition further alleged that at the time when the said perjury was alleged to have been committed, he, together with other Federal Prohibition Agents, was in the discharge of his official duty as Federal Prohibition Agent in making and attempting to make an investigation in the discharge of his duty and in protecting himself in the discharge of his duty, but it denied that he was guilty of the said perjury. Upon this petition the Court passed an order removing the case and directing the *writ of habeas corpus cum causa* to issue as prayed.

The writ was served and the petitioner was admitted to bail by the District Court of the United States for the District of Maryland.

After the record of the proceedings of the Circuit Court for Harford County was filed in said District Court pursuant to said order of removal, the State of Maryland appeared specially in said District Court and filed a motion to quash the writ and rescind the order of removal. Upon a hearing of said motion, the Court ruled that the petition for removal was defective, but granted leave to the petitioner to amend the same.

Thereafter, the petitioner filed an amended petition for removal. The amended petition differed from the original in the following particulars:

(1) It alleged that the petitioner was acting under the authority of, and enforcing not only the National Prohibition Act and acts supplemental thereto, but all internal revenue laws relating to the manufacture, sale, transportation, control and taxation of intoxicating liquors with authority to execute and perform all the duties delegated to such officers by law.

(2) It further alleged, in general terms, that at the time when the perjury is alleged to have been committed, the petitioner, with other Federal Prohibition Agents, was engaged in his official duty as a Prohibition Officer in making and attempting to make an investigation concerning a violation, not only of the National Prohibition Act, but of other internal revenue laws.

(3) It set out in great detail the acts and movements of the petitioner on the day, and the day before, the perjury is alleged to have been committed. It set forth that after the petitioner and the other Federal Prohibition Agents had completed an investigation in Harford County, Maryland, of a violation of the National Prohibition Law, they started to return to their automobile for the purpose of returning to Baltimore to report to the office of the Federal Prohibition Director concerning the results of their investigation, when they discovered a man, whom they afterwards learned to be one Lawrence Wenger, mortally wounded, and lying beside the path along which they were walking. They carried the wounded man to their automobile and took him to Jarrettsville, Maryland, and thence to Belair, Maryland, for the purpose of obtaining medical attention for him and finally placed the said Wenger in charge of a doctor in Belair,

who pronounced him dead. They then removed the body to an undertaker's establishment in Belair. They then proceeded to the State's Attorney's office in Belair, and related the facts aforesaid to the State's Attorney, whereupon they were placed under arrest by the Sheriff of Harford County at the instance of the State's Attorney and were confined in the Harford County Jail until the following morning, November 20th, 1924. On the morning of November 20th, 1924, they were taken by the Sheriff and State's Attorney, in company with a number of men who that afternoon served upon the Coroner's Jury, mentioned in the indictment, and in company with two Baltimore City Police Headquarters detectives, to the scene of their investigation of the previous day. There they related the facts concerning their investigation and their finding of the said Lawrence Wenger on November 19th, and then and there went over the scene of said occurrences "relating freely and without reservation the events which took place November 19th, in accordance with their duty as investigating and reporting officers of the Federal Government, and in compliance with their duties as Federal Prohibition officers. Likewise on the afternoon of November 30th, your petitioners were called before the Coroner's Inquest heretofore described in the indictment, and freely and without reservation, in accordance with their duty as investigating and reporting officers of the Federal Government, and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned."

(4) The removal was sought under *Section 28 of Title II of the National Prohibition Act,* as well as under *Section 33 of the Judicial Code.*

Upon the filing of the amended petition, the State of Maryland again appeared specially and again moved to

quash and remand. On May 5th, 1925, by order of the District Court, this motion to quash and remand was overruled, and the original order removing the case was ratified and confirmed.

In this proceeding the State of Maryland asks this Court to entertain a petition for mandamus, directed to Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the said District Court, to compel the said Judge and said Court to remand the said prosecution to the Circuit Court for Harford County, Maryland.

ARGUMENT.

The problems involved in this case are discussed at length in the briefs filed on behalf of the State of Maryland in support of the petitions for mandamus, filed in this Court simultaneously with this petiton, in the cases of "*State of Maryland vs. Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the District Court of the United States for the District of Maryland,* **CASE 'A'**," and "*State of Maryland vs. Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and the District Court of the United States for the District of Maryland,* **CASE 'B'**."

Your Honors are respectfully referred to said briefs for detailed statements of the legal propositions involved in this case. The questions in this case are identical with those in **CASE "B"**.

We, therefore, respectfully request that this Court issue the writ of mandamus as prayed in the petition,

and remand the prosecution of State of Maryland vs. E. Franklin Ely to the Circuit Court for Harford County.

Respectfully submitted,

THOS. H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland.

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NO. 25, ORIGINAL.

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FILE
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WM. R. STAN

IN THE

Supreme Court of the United States.

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "C."

REPLICATION.

MR. CLERK:

Please file.

THOMAS H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

The Daily Record Co. Print, Baltimore, Md.

States for the District of Maryland and the said District Court, from taking cognizance of the case entitled "State of Maryland vs. E. Franklin Ely," and from any, all and every act connected with the trial of said case, and commanding them to remand the said case to the Circuit Court for Harford County, and to redeliver to the jailor of said Harford County the body of the said E. Franklin Ely, to be dealt with according to the laws of said State.

WHEREFORE, the said State of Maryland prays this Honorable Court to issue its writ of mandamus to the said Morris A. Soper, District Judge, as aforesaid, and to the said District Court, commanding them to do so.

THOMAS H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

In the Supreme Court of the United States

OCTOBER TERM, 1925

NO. 25, ORIGINAL

EX PARTE: IN THE MATTER OF THE STATE OF MARYLAND

CASE " C "

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND

RETURN TO RULE

The answer and return of Morris A. Soper, Judge of the District Court of the United States for the District of Maryland, and of the District Court of the United States for the District of Maryland, to the rule on them laid by this Honorable Court to show cause why a writ of mandamus should not issue in accordance with the prayer of the petition.

The respondents, answering, say:

(1) All the acts of which petitioner complains were the acts of the respondent, the District Court of the United States for the District of Maryland. Of this Court the respondent, Morris A. Soper, at all times herein material, was and still is the duly appointed judge.

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(2) On February 11th, 1925, a petition was presented to the said District Court by E. Frank Ely. In it the petitioner set forth that he had been indicted on February 10th, 1925, in the Criminal Court of the State of Maryland for Harford County for the crime of perjury, by reason of the fact that on or about the 20th day of November, 1924, it was alleged that the petitioner had falsely sworn to material facts in connection with the prosecution for the murder of Lawrence Wenger; that the petitioner was a Federal Prohibition Agent of the Bureau of Internal Revenue of the United States; that the acts done by the petitioner were done in the discharge of his official duties, and that the prosecution in the said court was on account of acts alleged to have been done in the performance of the petitioner's duty as a Federal Prohibition Agent. The petitioner prayed that the prosecution be removed to the District Court of the United States, under Section 33 of the Judicial Code. The contents of this petition are set forth in Exhibit A to the petition of the State of Maryland for a writ of mandamus, at pages 17–19.

(3) Upon consideration of this petition, it was ordered by the District Court that writs of certiorari and habeas corpus cum causa should issue to remove the prosecution from the State Court. In obedience to these writs, the record in the State Court was, on February 21st, 1925, transmitted under protest to the District Court, and the petitioner was admitted to bail by the District Court.

(4) On February 18th, 1925, the State of Maryland, appearing specially in the District Court, moved to quash the writ and rescind the order of removal, and moved also to remand the cause to the State Court, for reasons set forth in the motion. This motion is fully set forth in Exhibit A to the petition of the State of Maryland for a writ of mandamus, at pages 23–24.

(5) After hearing full argument upon this motion, the District Court, on March 17th, 1925, granted leave to the United States, on behalf of the accused, to amend the petition for removal.

(6) On March 31st, 1925, pursuant to the leave granted, an amended petition for removal was filed. This petition set forth in full all the attendant circumstances and details surrounding the alleged perjury for which the petitioner was indicted. The amended petition recited these facts: On November 19th, 1924, the petitioner, in company with three other Federal Prohibition Agents and their chauffeur, had proceeded, under orders, to discover and destroy an illicit still in the woods near the village of Madonna, Maryland. After destroying this still, the petitioner and his companions started to return to their car, when they found the deceased, Lawrence Wenger, lying mortally wounded some 400 or 500 yards from the site of the still. They took him in their car and endeavored to obtain medical aid. At length they found a physician, who pronounced Wenger dead. The petitioner and his companions then reported the affair to the State's

Attorney, who forthwith had them arrested. They spent that night in jail. The next day they repeated their account to the State officials and to the Coroner's Jury. In the evening they were released on bail. The indictment, set forth at length in the petition, followed later. This indictment charged the petitioner with having committed perjury at the aforesaid examination before the Coroner's Jury. The alleged perjury consisted of the statement by the petitioner that he had never seen the deceased, Lawrence Wenger, at or about the time that the petitioner lay concealed and hidden near and watching the still mentioned in the evidence at the investigation. The petition concluded by stating:

> The said indictment is now pending in the Circuit Court for Harford County and is a criminal prosecution on account of acts alleged to have been done by your petitioner at a time when he was engaged in the performance of his duties as a Federal Prohibition Officer.

Removal of the prosecution was again prayed, under Section 33 of the Judicial Code. The contents of this petition are fully set forth in Exhibit A to the petition of the State of Maryland for a writ of mandamus, at pages 26–33.

(7) Upon consideration of this amended petition, it was again ordered by the District Court that writs of certiorari and habeas corpus cum

causa should issue to remove the prosecution from the State Court.

(8) On April 11, 1925, the State of Maryland, again appearing specially, moved to quash the writ, and rescind the order of removal, and moved also to remand the cause to the State Court. The reasons set forth in support of this motion were:

> (1) Because the allegations of the second paragraph of the amended petition are untrue.
>
> (2) Because the allegations of the petition filed in this case do not disclose a state of facts entitling the petitioner to have said writ issued, or the charge against him removed into this Court.
>
> (3) Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, and in part untrue.
>
> (4) Because the issuance of said writ upon the allegations of said petition and attached certificate of counsel is beyond the power and jurisdiction of this Court as limited by the Constitution and laws of the United States.
>
> (5) Because the said writ, if allowed to stand, constitutes an interference by this Court with due and orderly administration of justice in the Circuit Court for Harford County contrary to the Constitution and laws of the United States.
>
> (6) Because there is no allegation in said petition that authorizes this Court to issue any writ whatsoever against the Judge or

the Clerk of the Circuit Court for Harford County.

(7) Because the crime of perjury against the laws of the State of Maryland for which E. Franklin Ely has been indicted in the Circuit Court for Harford County could not possibly have any causal connection with the duties of the said E. Franklin Ely as a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

(8) Because it is inconceivable that in the discharge of his duties as a Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States, it would be necessary for the said E. Franklin Ely to commit the crime of perjury against the laws of the State of Maryland.

(9) Because at the time of the commission of said crime of perjury, the said E. Franklin Ely was testifying under oath before an officer of the State of Maryland, duly authorized to administer oaths, and was not at that time engaged in the performance of any duty pertaining to his office as Federal Prohibition Agent of the Bureau of Internal Revenue of the Treasury Department of the United States.

(10) And for other good and sufficient reasons to be shown at the hearing.

The motion is set forth in full in Exhibit A to the petition of the State of Maryland for a writ of mandamus, at pages 35–37.

(9) On May 5th, 1925, after hearing full argument, the District Court overruled the motion of the State of Maryland, and ratified its former order of February 11th, 1925, removing the prosecution from the State Court.

(10) In ordering the removal of the prosecution, and in denying the motion to remand, the District Court was of the opinion that the petitioner was entitled to removal under that portion of Section 33 of the Judicial Code which authorizes removal—

> when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law.

And the District Court was further of the opinion that the petitioner was entitled to removal, even in the event that he was not a "revenue officer," by virtue of Section 28 of the National

Prohibition Act (Act of Oct. 28, 1919, c. 85, 41 Stat. 305, 316), which provides:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power *and protection* in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

(11) The District Court was further of the opinion that the petitioner, at the time of the acts which gave rise to this indictment, was acting in the performance of his official duty in the enforcement of the National Prohibition Act and of other laws of the United States relating to the manufacture of intoxicating liquors (particularly Rev. Stats. 3257–3260, 3276, 3278, 3281, and 3282) and in reporting the results of the said investigation.

(12) The District Court was further of the opinion that the facts set forth in the amended petition clearly disclosed that a prosecution had been commenced against the petitioner on account of acts done under color of his office and of the revenue and prohibition laws of the United States, notwithstanding that the petitioner did not admit having committed the crime of perjury as charged in the indictment.

(13) The District Court therefore adjudged that, under the facts of the case, it possessed ample jurisdiction to order the removal of the prosecution from the State Court and ample jurisdiction to proceed with the trial of the cause, which it intends to do.

(14) The respondents assert that upon the record established by the amended petition for removal and by the motion of the State of Maryland to remand, the District Court had lawful jurisdiction to order the removal of the prosecution. In deciding upon the questions of law and fact raised by the amended petition for removal, the District Court acted in the exercise of its judicial discretion and within the bounds of its lawful jurisdiction. And the respondents deny that the action of the District Court was a gross violation of the Constitution and laws of the United States or of the Constitution and laws of the State of Maryland. And the respondents deny that the District Court has either transcended its jurisdiction or usurped the jurisdiction of the State of Maryland.

And now these respondents, having made return to and fully answered the rule upon them laid, humbly pray that the rule may be discharged and that the petition of the State of Maryland may be dismissed.

Nevertheless, the respondents respectfully submit to and will abide the judgment of this Honorable Court and will enforce, by proper orders or

action, any direction given by this Honorable Court in the premises.

MORRIS A. SOPER,
Judge of the District Court of the United States for the District of Maryland.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General,
Counsel for the Respondents.

UNITED STATES OF AMERICA,

District of Maryland, ss:

Before me, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, personally appeared on this day Morris A. Soper, Judge of the said Court, whose name is signed to the foregoing answer and return, who, being duly sworn by me, says that the same is true to the best of his knowledge, information, and belief.

Given under my hand and the seal of the said Court, this 13th day of November, 1925.

[SEAL.] ARTHUR L. SPAMER,

Clerk of the District Court of the United States for the District of Maryland.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 25, ORIGINAL

EX PARTE: IN THE MATTER OF THE STATE OF MARYLAND

CASE "C"

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR RESPONDENTS IN SUPPORT OF RETURN TO THE RULE

GROUNDS OF JURISDICTION

This case, like Nos. 23 and 24, Original, is a petition by the State of Maryland for a writ of mandamus to the District Court for the District of Maryland. The jurisdiction of this Court is invoked under Section 234 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156).

On October 12th, 1925, this Court granted a rule to show cause why a peremptory writ should not issue. The rule was made returnable on or before November 16th, 1925.

STATEMENT

The purpose of the petition is to compel the District Court to remand to the Circuit Court of the State for Harford County an indictment charging E. Franklin Ely, a Federal Prohibition Agent, with the crime of perjury. Ely is one of the five persons who are the objects of a prosecution for murder in Case "A" (Original No. 23) and who are also the objects of a prosecution for conspiracy to obstruct justice in Case " B " (Original No. 24). Most of the facts in the present case have been already set forth in the respondents' briefs, in Cases "A" and "B." For convenience, they will be briefly repeated here.

The defendant, Ely, was a duly appointed Federal Prohibition Officer. His commission empowered him—

> "to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto *and all Internal Revenue Laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors*" * * * and to execute and perform all the duties delegated to such officers by law." (Exhibit A to Petition of the State of Maryland, pp. 40-41.)

On November 19, 1924, the defendant, Ely, and three other Prohibition Officers, together with their chauffeur, Trabing, were ordered by the Federal Prohibition Director for Maryland to investi-

gate the alleged unlawful distilling of liquor on an unoccupied farm near the village of Madonna, Maryland. They went there by motor, arriving shortly after noon, and discovered in a secluded valley the materials for illicit distilling. They hid themselves in the woods. Soon afterwards a number of men came up, carrying a still. When the officers made their presence known the men dropped the still and fled. The officers pursued, but failed to arrest anyone. They thereupon returned to the still, destroyed the materials, and proceeded back to their car to return to Baltimore and report the affair to their superior. On their way to the car, about 400 or 500 yards from the site of the still, they found a man (Wenger) lying mortally wounded. They picked him up and took him in their car to Jarrettsville, and thence to Bel Air, in search of a doctor. By the time one was found, the man was dead. The officers then at once reported the matter to the State's Attorney in Bel Air. Upon learning that his informants were Prohibition Officers, the State's Attorney at once ordered all five to be placed under arrest. They were confined in the local jail that night; and the next day they gave further information to the State officials and to the Coroner's Jury. The charge of perjury which gives rise to the present case was predicated upon the statement made by the defendent, Ely, before the Coroner's Jury that

he *had not seen Wenger* at the time when Ely and the other officers lay hidden watching the still. The indictment for perjury is set forth in full in the amended petition of Ely for removal of his cause to the Federal Court. (Exhibit A to petition of the State of Maryland, at pp. 26–28.)

On the evening of November 20th Ely, together with his companions, was released on bail at the instance of the United States Attorney. In February, 1925, the indictment for perjury against Ely was returned by the grand jury of the State to the Circuit Court for Harford County. The defendant petitioned for removal of the cause, under Section 33 of the Judicial Code. Removal was granted. Subsequently, the State of Maryland moved to quash the order of removal and to remand the prosecution to the State Court. After argument upon this motion, leave was granted to amend the petition for removal. The petition was accordingly amended to set forth in greater detail all the circumstances surrounding the indictment. Proper allegations were included, stating that the defendant was a Federal officer, and that at the time when the alleged perjury was committed, he had been in the discharge of his duties—

> "as a Federal Prohibition Officer, and in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal Revenue

> Laws, and in reporting the results of said investigation concerning a violation of the National Prohibition Act and other Internal Revenue Laws, and in protecting himself and his fellow officers of the Internal Revenue in the discharge of his and their duty.

It was also alleged that the defendant and his associates had been called before the Coroner's Inquest as set forth and had—

> without reservation in accordance with their duty as investigating and reporting officers of the Federal Government and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned.

The defendant did not, however, admit that he had committed any perjury. The petition ended by alleging that the indictment for perjury was—

> a criminal prosecution on account of acts alleged to have been done by your petitioner at a time when he was engaged in the performance of his duties as a Federal Prohibition Officer.

Upon this amended petition removal was granted. The State of Maryland again moved to quash the order of removal and to remand the cause. Its motion was denied. To compel the District Court to remand the cause, the State has now petitioned for a writ of mandamus from this Court.

ARGUMENT

SUMMARY

I. The Prosecution for Perjury Was Properly Removable, Notwithstanding That the Defendant Did Not Admit the Charge.

II. The Decision of the District Court Granting the Petition for Removal, and Denying the Motion to Remand, Was an Exercise of Lawful Judicial Discretion, and Can Not Be Controlled by Mandamus.

I

The Prosecution for Perjury Was Properly Removable, Notwithstanding That the Defendant Did Not Admit the Charge.

Points I and II of the respondents' brief in Case "A" (No. 23 Original) dealt with the application of Section 33 of the Judicial Code and Section 28 of the National Prohibition Act to prosecutions against Federal Prohibition Agents. Point I of the respondents' brief in Case "B" (No. 24 Original) dealt with the necessity for an admission of the act charged as a prerequisite to the right of removal. It is unnecessary here to repeat those arguments at length. It is submitted that there is no necessity for any such admission of guilt.

Tennesse v. *Davis*, 100 U. S. 257.
Alabama v. *Peak*, 252 Fed. 306.
Oregon v. *Wood*, 268 Fed. 975.

In the case now under consideration it is submitted that to require such an admission would be altogether unreasonable. If the accused officer in this case were required to incriminate himself by admitting that he had committed perjury, before

he could claim the right of removal, the subsequent proceedings would be a farce. His guilt would be established by his own sworn statment, and there would be nothing left for any Court, Federal or State, to try. It is submitted that Section 33 of the Judicial Code contains nothing which requires such an admission.

With respect to the proper interpretation of Section 33, and in particular with respect to the phrases "color of office" and "color of law", reference is made to the respondents' brief in Case "B," at pages 12–15.

It is of course true, as the State of Maryland urges, that the Internal Revenue laws do not require Federal officers to commit perjury. But the accused officer in this case does not admit that he committed perjury. He is not seeking to be freed of liability under the charge. He seeks only to have his guilt or innocence determined in the Federal Court.

It is also true that perjury may be regarded as "peculiarly an offense against the courts of a particular sovereign;" and it is urged that it should be triable only by that sovereign. The same reasoning certainly applies to the case of contempt of court, and to the case of murder, which this Court has declared to be governed by "the most unquestionable and most universally applicable of State laws." *Johnson* v. *Maryland,* 254 U. S. 51. Yet Federal officers accused of murder and of contempt of State courts have in numberless cases

been granted aid, either by removal or by discharge on habeas corpus, by the Federal courts.

Boske v. *Comingore,* 177 U. S. 459.
Tennessee v. *Davis,* 100 U. S. 257.
Massachusetts v. *Bogan,* 285 Fed. 668.

At the time this alleged perjury was committed, the accused was still a Federal officer, and had come, shortly before, from the performance of his duty in destroying an illicit still. When he had given his information to the State's Attorney, and had informed the State's Attorney that he was a Federal officer, he had at once been placed in custody. He remained in custody until and during the hearing before the Coroner. In his petition for removal, proper allegations were made as to his official capacity. It is submitted that the charges of murder (Case A), of conspiracy (Case B), and of perjury (Case C), are so closely inter-related that they can not be separated. The charges in Case B and Case C arose directly out of the charge of murder in Case A. It is submitted that all three must be considered together, and that all three are properly removable to the Federal court.

II

The Decision of the District Court Granting the Petition for Removal, and Denying the Motion to Remand, was an Exercise of Lawful Judicial Discretion, and can not be Controlled by Mandamus.

Argument in support of this proposition has already been given at length under Point II of the respondents' brief in Case "B," at pages 15–19. It

will be necessary here to give only a brief additional mention of the facts in this case.

The petition of the accused officer for removal included, of course, full allegations of the facts upon which the right to removal was based. *The motion to remand, interposed by the State of Maryland, directly traversed these allegations.* Among the grounds assigned for that motion were these (Exhibit A to petition for mandamus, at pages 35–37):

> (1) Because the allegations of the second paragraph of the amended petition are untrue. (This paragraph contained an allegation that the petitioner was a Federal Prohibition Officer of the Bureau of Internal Revenue, acting to enforce the National Prohibition Act and the Internal Revenue Laws relating to the manufacture, etc., of intoxicating liquor.)
>
> (3) Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, and in part untrue.
>
> (10) And for other good and sufficient reasons to be shown at the hearing.

It is very clear, therefore, that by the petition for removal and by the motion of the State to remand, issues both of law and fact (or issues of mixed law and fact) were raised. It is submitted that the decision of these issues of law and *fact* rested with the District Court alone. The petition for removal was duly verified under oath and was signed by the petitioner. The District Court was entitled to treat it as *evidence* of the facts therein

contained. It is submitted that the District Court was at liberty to believe or to disbelieve that evidence in its own discretion, and according to its belief or disbelief, to deny or to grant the motion of the State to remand the cause. It is submitted that the writ of mandamus can not be used to control the lower court's discretion in deciding upon the issues thus presented. In passing upon the claim of the accused officer for removal, the District Court was acting within its lawful jurisdiction. That Court alone had authority to decide the issues presented. If it has erred, it has erred only in discretion. Such an error, if it exists, cannot be corrected by mandamus.

Ex Parte Muir, 254 U. S. 522,
In re Cooper, 143 U. S. 472,
In re Rice, 155 U. S. 396, 403,
Tennessee v. *Davis,* 100 U. S. 257, 261,
And cases cited in respondents' brief in Case B, at pages 15–19.

CONCLUSION

It is therefore respectfully submitted that the rule should be discharged, and that the petition for a writ of mandamus should be denied.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General,
Of Counsel for the Respondents.

NOVEMBER, 1925.

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NOS. 23, 24 AND 25, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "A," CASE "B" AND CASE "C."

SUPPLEMENTAL BRIEF.

MR. CLERK:

Please file.

THOMAS H. ROBINSON,
Attorney General of Maryland,

HERBERT LEVY,
Assistant Attorney General of Maryland,
Attorneys for the State of Maryland.

The Daily Record Co., Print, Baltimore, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

NOS. 23, 24 AND 25, ORIGINAL.

STATE OF MARYLAND

versus

MORRIS A. SOPER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, AND THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

CASE "A," CASE "B" AND CASE "C."

SUPPLEMENTAL BRIEF.

POINTS TO BE DISCUSSED.

I. AN OFFICER, WITHIN THE PROVISIONS OF SECTION 33 OF THE JUDICIAL CODE, MUST SHOW, AS A CONDITION PRECEDENT TO HIS RIGHT TO REMOVE THEREUNDER, THAT THE ACTION OR PROSECUTION AGAINST HIM AROSE OUT OF SOME OFFICIAL ACT.

II. THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS NOT AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, BUT, ON THE CONTRARY, WAS A WRONGFUL ASSUMPTION OF JURISDICTION FOR WHICH THE ONLY REMEDY IS MANDAMUS.

I.

AN OFFICER, WITHIN THE PROVISIONS OF SECTION 33 OF THE JUDICIAL CODE, MUST SHOW, AS A CONDITION PRECEDENT TO HIS RIGHT TO REMOVE THEREUNDER, THAT THE ACTION OR PROSECUTION AGAINST HIM AROSE OUT OF SOME OFFICIAL ACT.

The historical basis of *Section 33 of the Judicial Code*, was the attempt of the States, *by statutory enactment*, to nullify the acts of Congress, by making criminal, acts which Congress authorized and directed Federal revenue officers to perform. Yet, it is also true, as contended by the respondents, that the Courts have given the statute a much broader construction so as to include within its scope all official acts, whether within a State *statutory* prohibition or not. The effect of this has been to accord to these Federal officers the right to have actions and prosecutions against them tried in the Federal Courts, whenever such actions or prosecutions have arisen out of the exercise by them of some prerogative within the scope of their official duties. Beyond this, it cannot be contended that the Removal Statute, either in its letter or spirit, was intended to establish the Federal Courts as a special forum for Federal officers, irrespective of the manner in which the actions or prosecutions against them may have arisen. For if this was the intention of Congress, the privilege of removal would not have been circumscribed so definitely and particularly. Congress undoubtedly intended to limit and restrict the privilege to suits or prosecutions "on account of any act done under color of his office or of such law"; otherwise there would have been no necessity for the use of this restrictive and modifying language.

The Removal Act was the result of an open defiance by the States, as such, of the exercise of Federal authority. It did not contemplate and was not directed against

fraudulent and nefarious concoctions upon the part of individuals who were not in sympathy with the Federal law.

It might be assumed from the contentions made by the respondents in this case that the sole purpose of the law was to protect Federal officers from civil actions or criminal indictments for something which the officers never did, that is to say, from concocted or "trumped up" actions and prosecutions. There is nothing in the legislative history of the law to indicate that it was such an evil against which the law was directed. Congress had the alternative of excluding such cases altogether or extending the right of removal to Federal officers in all civil actions or criminal prosecutions brought against them, without restriction. Exclusion was the only practicable and sensible solution, for if the hostility against the law was so great that actions and prosecutions were deliberately concocted for the purpose of jailing and harrassing the Federal officers, such cases could be based as readily on acts alleged to have been performed by them after working hours, while they were in their homes, or engaged in their own personal pleasure or business, as well as upon acts alleged to have been committed by them in the course of their official duties.

Fortunately, such concoctions are rare. Congress left it to the decency and honesty of the administration of justice in the State Courts to expose them. *Open defiance* of the Federal law was grounded at least in an honest and fearless disagreement with Federal policy. This, Congress had a perfect right to attempt to counteract. But it is not to be assumed that the States themselves were, or are, so devoid of honor as to prostitute their judicial tribunals by scheming artifice in order to hinder the enforcement of unpopular Federal laws, or that their

Courts are so impotent and their judicial system so defective, that honest defense will not prevail over fraudulent contrivance.

We submit that where, as in the case at bar, the officer denies all knowledge of the act which is the foundation of the civil action or criminal prosecution, necessarily, the right of removal does not exist, because, in such a case, there is an absence of an official act which is the basis of the statutory right. A few examples will demonstrate the utter unsoundness of such an application of the language of the statute. In the case at bar the only justification for the removal is the fact that the prohibition agents were returning from an investigation, made in the performance of their duties, to report the results of the investigation to their superior officer. We maintain that this does not constitute an act done under color of office within the meaning of the law, because the mere fact of returning from an investigation to report the results thereof to a superior officer is not an official act which resulted in the prosecution.

Suppose, for instance, a revenue officer, detailed to make an investigation of a violation of the revenue laws, motored, with his wife, to the scene of the investigation, and after completing his work, while on his way to report to his superior officer, he suddenly took a notion to beat his wife. Certainly it could not be contended that a criminal prosecution arising out of such an act could be removed as an act done under color of his office, although in that case, just as much as in the instant case, the alleged crime occurred while the officer was returning from an investigation to report to his superior.

Again, if upon the return of an officer from an investigation, to report to his superior, he was walking along Pennsylvania Avenue on his way to the Treasury De-

partment and engaged in a street brawl or riot, a prosecution arising therefrom would not be removable.

And again, if an officer, on his return from an investigation to report to a superior officer, borrowed an hundred dollars, and thereafter failed to repay the money, and was sued civilly therefor, he could not contend that such an act was done under color of his office, so as to entitle him to remove the action.

We submit that it is clear from these examples, that the mere act of returning from the scene of duty to report to a superior officer is not sufficient to justify the removal of every action or prosecution arising out of every act alleged to have been committed during such time.

The officer must show that the prosecution or action would not have arisen except for the performance of an act which it was incumbent upon him to perform in the course of his duties.

It is argued that if he were compelled to set up such an act as a condition of removal, this would be a violation of the privilege against self-incrimination. But this presupposes, first, that the application for the removal of the cause is mandatory upon the officer, that is to say, that he is compelled under the law to seek a removal of the case against him; and, secondly, that the setting up of an official act which gave rise to the action or prosecution, necessarily involves the admission of a crime. This latter contention obviously fails to take into account the distinction between the denial of an act and the denial of the criminality of such act as pointed out in the Court's opinion in *Alabama v. Peak*, 252 Fed. 306. Is there any self-incrimination in the position taken by the officer in the case of *Tennessee v. Davis*, 100 U. S. 257, where the officer admitted that he killed, but claimed that it was neces-

sary for him to do so in his own self-defense, while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal revenue laws of the United States? Or, in the case of an officer, charged with larceny, who admits taking the goods but claims that it was necessary to have them as evidence in a prosecution against the person in whose possession they were found?

The respondents lay great stress upon the use of the word "color" in the statute, and contend, in effect, that inasmuch as acts done "under color of office" may very well prove insufficient to establish a complete justification, and the phrase "color of office" covers a claim which may later turn out to be groundless as well as a claim, which further investigation shows to have been well founded, that Congress intended to accord the right of removal to every officer, who, in his petition for removal used the broad, general, magic words "act done under color of office," regardless of the incongruity between such allegation and the actual facts of the case, as detailed in the petition. A fair analysis of the cases upon this point gives no color to such a contention. When Congress adopted the term "under color of office," it undoubtedly intended to permit the removal, upon the statement of the officer of facts, which show that the action or prosecution arose out of an official act, even though such statement proves thereafter to be totally unfounded.

In our Case "A" brief (pp. 26-28), we point out the distinction between the requirements of the removal statute and the provisions of *Section 753 of the Revised Statutes*, authorizing the Federal Courts to release by habeas corpus, persons "in custody for an act done or omitted in pursuance of a law of the United States."

Under the latter statute, it must not only be *alleged* that the act done was within the scope of the officer's authority, but that fact must be affirmatively established, before the Court can act. Under the removal statute, it is not necessary to establish that the act done was within the actual scope of the officer's authority, so long as it is alleged or claimed that such is the case, and a state of facts is presented to the Court by the petitioner which justifies such a claim.

"Color of office" merely means that the petitioner must establish *prima facie* that the act done was within the scope of his official duties, and not establish this as a matter of fact, as is required under *Section* 753 *of the Revised Statutes.*

In other words, under *Section* 753, an officer must *show* he had the authority, and the act for which he is held grew out of the exercise of such authority. Under the Removal Act, it is merely necessary that he *allege* he was acting within the scope of his authority and set forth facts sufficient to establish this *prima facie.*

The respondents have not cited a single authority which is at variance with this statement of the law.

"Color of office," as used in the act is an honest belief in a state of facts, which, if it exists would be a legal justification or excuse; such semblance or appearance of right as shows that the right is really in dispute. It is the presumption of authority sustaining the acts of the officer, which is derived from his apparent title to the office or from a writ or other process in his hands apparently valid and regular.

"Color of office," as used in the Removal Statute, certainly does not imply bad faith, corruption or breach of

duty, qualities which are ascribed to the term under some of the authorities, cited in the respondents' supporting briefs, such as *Bouvier L. D. s. v. Color of Office* and *Griffiths v. Hardenbergh*, 41 N. Y., 464, where it was defined as "an act wrongfully done by an officer under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of color." For, when we consider that the statute was intended to accord its privileges to officers in the discharge of their duties and to prevent embarrassment to the Government in the collection of its revenues, it is obvious that the term "color of office" cannot be given an evil significance. It may be assumed that the Federal Government was not zealous of conferring special privileges upon its officers *who exceed their authority*. The purpose was to insure those in the Government service of a fair, impartial trial and an acquittal where they have acted *in pursuance of the power and authority vested in them*.

II.

THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS NOT AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, BUT, ON THE CONTRARY, WAS A WRONGFUL ASSUMPTION OF JURISDICTION, FOR WHICH THE ONLY REMEDY IS MANDAMUS.

In our brief in Case "A," we point out with some particularity the rules which have been laid down for the issuance by this Court of the writ of mandamus to compel an inferior Federal Court to remand a case pending therein to the State Courts. These rules may be summarized as follows:

1. The remedy of mandamus cannot be resorted to in a *civil proceeding*, because

(a) Mandamus cannot be used to compel an inferior Court to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, and

(b) The writ cannot be used to perform the office of an appeal or writ of error.

2. In *criminal proceedings*, where a case has been unlawfully removed by an inferior Federal tribunal, this Court, upon the application of the State, can compel the remand of the prosecution to the State Courts, because

(a) *Section* 688 *of the Revised Statutes* specifically empowers this Court to issue writs of mandamus, in cases warranted by the principles and usages of law to inferior Federal tribunals, *where a State is a party;* and

(b) No power otherwise exists to correct the wrongful assumption of jurisdiction by the inferior Federal Court, for an appeal from an order of a District Court refusing to remand a case to a State Court, can be had only after final judgment, and if the final judgment is one of acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment.

These principles are not seriously controverted in the respondents' briefs, and no *criminal* case is cited or referred to where mandamus was denied.

It is strenuously urged, however, that inasmuch as the petition of the accused officers for removal was duly verified under oath and was signed by all five of the petitioners, and inasmuch as the motion to remand interposed by the State of Maryland, directly traversed the allegations in the petition for removal, that a controverted issue of fact, or of mixed law and fact, was presented to the

Court for its determination, and that where the facts stated in a petition for removal are put in issue, the decision of the District Court upon that issue, cannot be reviewed by mandamus.

But we respectfully submit that there was no issue of fact before the District Court. It is true that the facts as stated in the petition for removal were traversed in the motion to quash and remand filed on behalf of the State, but it is likewise true that even if there had been no traverse it could have been assumed that the State of Maryland was not in accord with a statement of the facts, which showed the petitioners were innocent of the crime for which the State had indicted them.

Certainly, even without a traverse, it must be taken for granted that the District Court could not assume that the allegations in the petition were admitted by the State to be true.

We emphatically deny that there was any controverted issue of fact before the District Court. No testimony was taken to support such an issue, on one side or the other.

If the allegations of the petition for removal are taken to be *prima facie* true, then when their truth is challenged by the party who seeks to block the removal, the burden rests upon the petitioner to establish the truth of these allegations by testimony. There was no effort or attempt in this case, upon the part of either the petitioners or the State of Maryland to do this, and *in the arguments before the District Court, the motion to quash and remand was treated as a demurrer to the legal sufficiency of the averments of the petition.*

The authorities cited in the respondents' brief in Case "B" (page 16), although they involve civil proceedings

and are therefore not applicable to the case at bar, hold that the allegations of fact in a petition for removal are not put in issue merely by motion to remand.

> "In this Court parties wishing to raise an issue of fact affecting the jurisdiction of the Court have been permitted to do so by plea or answer, but a mere motion to remand, * * * presents only the questions of law which arise from the facts shown by the Record."
>
> *Carlisle v. Sunset Telephone Co.*, 116 Fed. 896.

See also:

Stone v. South Carolina, 117 U. S. 430-432, *and cases there cited.*

It should also be noted in this connection that the respondents assert a proposition, which if conceded, should be sufficient to require the relief to be granted in this case. They seem to admit that the jurisdiction of the District Court in this case was doubtful. If this be true, then it was the duty of the District Court to remand.

Dowd v. United Electric Co., 132 Fed. 252, 265, *and cases cited; Concord Coal v. Haley*, 76 Fed. 882; *Hutchinson v. Bugbee*, 56 Fed. 329; *Boatman's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 650; *Wrightsville Hardware Co. v. Colwell*, 180 Fed. 586; *Western Telegraph Company v. Louisville & N. R. Co.*, 201 Fed. 932; *Drainage District v. Chicago, M. & St. P. R. R. Co.*, 198 Fed. 253, 264; *Eddy v. Chicago & Northwestern R. R. Co.*, 226 Fed. 120, 125; *Hauson v. Pacific Coast Asphalt Cement Co.*, 243 Fed. 283.

A State Court is not bound to surrender its jurisdiction on a petition for removal, until a case is made which on the face of the record shows the petitioner has a right to the transfer.

Stone v. S. C., 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Mays v. Newlin*, 143 Fed. 574-576; *Coker v. Monaghan Mills*, 110 Fed. 803, 806; *McAlister v. C. & O. R. R. Co.*, 85 C. C. A. 316, 157 Fed. 740, 13 A. & E. Annotated Cases 1068; *Home Insurance Company v. Morse*, 20 Wall. 445, 459, 22 L. ed. 370; *Kansas City Ft. S. & M. R. Co. vs. Daughtry*, 138 U. S. 298, 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Donovan v. Wells Fargo & Co.*, 22 L. R. A. (N. S.) 1235, 1250, 94 C. C. A. 609, 169 Fed. 364; *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Johnson v. Wells Fargo & Co.*, 98 Fed. 3, 25; *Lake Street Elevated R. R. Co. v. Farmers Loan & Trust Company*, 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed. 769, 773.

It must be remembered that the decision of the Court below was based upon the assumption that all of the facts set forth in the petition for removal were true and the State's contentions before the District Court, and in this Court, are made upon that assumption.

In *Tennessee v. Davis*, 100 U. S. 257-261, this Court said: "But the Act of Congress authorizes the removal of any case, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a Federal officer. It makes such a claim a basis for the assumption of Federal jurisdiction of the

case, and for retaining it, *at least until the claim proves unfounded.*"

It is the State's contention that the very allegations of the petition for removal show there is no basis for the assumption of Federal jurisdiction of the case, and the petitioners' own statement of the facts proves that their claim, that the acts for which they were indicted were done in the discharge of their duty as Federal officers, is unfounded. Moreover, we respectfully submit that this case can be determined by this Court regardless of what happened in the District Court, because in at least two cases in this Court, it has been held that where in a criminal prosecution, a Judge has unlawfully assumed jurisdiction of the prosecution, by removal, *no previous motion to him to remand the case is necessary.*

Virginia v. Paul, 148 U. S. 107, 122-123;
Virginia v. Rives, 100 U. S. 313, 316, 323, 324.

This Court is, therefore, authorized to treat this question *de novo*, and decide it solely upon the allegations of the petition for mandamus filed in this Court, which assumes, for the purposes of this case, all of the allegations of fact in the petition for removal to be true.

Respectfully submitted,

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